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Supreme Court
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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER AND DODGE L. MARKS, COMPOSING THE FIRM OF PATTERSON, EAGLE, GREENOUGH AND DAY; RAYBURN L. FOSTER AND R. B. F. HUMMER, COMPOSING THE FIRM OF HUMMER & FOSTER; ALMOND D. COCHRAN, SURVIVING PARTNER OF THE FIRM OF COCHRAN & ELLISON; C. B. MCCROBY AND DUDLEY C. MONK, COPARTNERS COMPOSING THE FIRM OF MCCROBY & MONK; AND ELMER S. BAILEY, INDIVIDUALLY AND AS PROCHEIN AMI OF JACKSON BARNETT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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THE EQUITABLE TRUST COMPANY OF NEW YORK; Murray, Aldrich & Roberts; Edward J. Patterson; J. Frederick Eagle; William Greenough; Sherman Day; Carroll G. Walter and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough and Day; Rayburn L. Foster and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, copartners composing the firm of McCrory & Monk; and Elmer S. Bailey, individually and as *prochein ami* of Jackson Barnett.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION

The Solicitor General on behalf of the United States of America prays that a writ of certiorari issue to review a judgment of the United States

Circuit Court of Appeals for the Second Circuit entered in the case of Jackson Barnett, a mental incompetent, by Elmer S. Bailey, his *prochein ami*, plaintiff, *v.* The Equitable Trust Company of New York and The American Baptist Home Mission Society, defendants, United States of America, intervener, on September 18, 1929 (R. 377, 384), reducing but otherwise affirming, an award made by decree of the United States District Court for the Southern District of New York (R. 347) to certain of the respondents out of the restricted property of Jackson Barnett, a full-blood Creek Indian, for their services and disbursements as attorneys and *prochein ami*, respectively, in that case.

QUESTION PRESENTED

The question presented is:

Whether in view of the final decision and decree of the District Court in the original case that the attempted gift, transfer, and assignment of the restricted funds to the defendants therein was null and void, the courts below had any power to charge the restricted property with allowances for attorneys' fees, services, and disbursements. The Government also contends that the allowances were excessive in amount.

STATEMENT

Jackson Barnett, a full-blood Creek Indian, now seventy-eight years of age, is possessed of land allotted to him by the Government from the tribal lands of the Creek or Muskogee Nation, one of the

Five Civilized Tribes of Indians in the State of Oklahoma. Under an approved oil and gas lease (R. 27) royalties had accrued and accumulated in the hands of the Secretary of the Interior in excess of $1,100,000. Jackson Barnett was of inferior mental capacity, and his intelligence was so stunted and undeveloped that in ordinary business transactions he lacked the capacity to understand and know what he was doing. (R. 193.)

On December 15, 1922, he put his thumb mark to an instrument (R. 40), which among other things purported to authorize, subject to the approval of the Secretary of the Interior, a gift of $550,000 in United States Liberty Bonds derived from the royalties from his allotment to The American Baptist Home Mission Society in trust for certain purposes. On February 1, 1923, the Secretary of the Interior approved that purported gift, and shortly thereafter The American Baptist Home Mission Society delivered the bonds to The Equitable Trust Company of New York under a trust agreement approved by the Secretary. (R. 62–68.) Prior to this alleged gift, the bonds in question had been in possession of the Secretary of the Interior and were subject to his sole supervision and control as property of an Indian whose status was that of a restricted Indian ward of the Government (Sections 1 and 2, Act of May 27, 1908, *infra*, pp. 10, 11).

Suit was commenced January 22, 1925 (R. 1), by Elmer S. Bailey as *prochein ami* for Jackson Barnett, against The Equitable Trust Company of New

York and The American Baptist Home Mission Society, for the purpose of having the bonds and the proceeds declared to be the property of, and impressed with a trust for, the plaintiff, and of having the defendants account for the same, and turn them over to the plaintiff (R. 1, 24, 25).

The United States was granted leave to intervene (R. 104), and in its amended petition of intervention (R. 131) asked that the defendants account for the bonds and proceeds, that any title of the defendants be declared in trust for the benefit of the plaintiff, that the defendants be required to deliver the bonds and the proceeds thereof to the Secretary of the Interior, and that all the trust agreements connected with the bonds be declared void (R. 167, 168). After the order of intervention the United States participated in the preparation of the case and in the trial through the United States Attorney for the Southern District of New York and through Special Assistants to the Attorney General. (R. 295–314.)

On March 6, 1926, the District Court granted a motion of the plaintiff by his *prochein ami*, the United States not opposing, for expense money out of the income of the fund in the sum of $3,000, to be applicable only to such expenses as thereafter were allowed and approved by the court. (R. 126.)

The case was tried November 16 to 24, 1926, before the District Court. (R. 2.) The single issue of fact was the mental condition of Barnett. The single issue of law was whether, in view of Bar-

nett's mentality, the Secretary of the Interior had the power to authorize the disposal of the funds in question. On August 9, 1927, the District Court rendered an opinion (R. 172) holding that the gift was void because of the plaintiff's incompetence and lack of comprehension and understanding of his action in making the same (R. 193); that the gift could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds to the Secretary of the Interior to be held by him as the property of plaintiff (R. 195). On November 21, 1927, a decree to this effect was entered. (R. 196.) The decree retained jurisdiction of the cause, and the property, for the purpose of entertaining and deciding applications by counsel for plaintiff and counsel for defendants for allowances out of the property for their services and disbursements.

Such applications were postponed pending an appeal taken by the defendant, The American Baptist Home Mission Society. Such appeal was dismissed May 7, 1928, by the Circuit Court of Appeals because The Equitable Trust Company, another defendant, had not been made a party. (26 F. (2nd) 350.) Application made to this Court for a writ of certiorari was thereafter denied (228 U. S. 626), so that the decision of the District Court became final on the merits of the original action.

Thereafter, the *prochein ami*, counsel for plaintiff, and counsel for defendant, The Equitable Trust Company of New York, asked for allowances.

The affidavits supporting the application by plaintiff's counsel show that the case had been taken by the firm of Hummer & Foster, of Oklahoma, on a contingent basis (R. 210, 233), the fee to be forty per cent of the amount recovered, under a contract, dated December 11, 1924, between Elmer S. Bailey, as guardian of Jackson Barnett, and R. L. Foster, for that firm (R. 260). At the time the amended bill of complaint was filed, and at the time of the trial, Bailey was acting as guardian for the plaintiff and seeking the return of the bonds to him as such guardian, on the theory that while the instrument of gift executed by Barnett was invalid, the Secretary of the Interior had released the bonds from restrictions, but before the case was decided and the decree entered by the District Court, his appointment as guardian had been set aside as invalid. (R. 254; *Appeal of Barnett,* 122 Okla. 160.)

The firm of Hummer & Foster, with which the above-mentioned agreement was made, called in to assist them the firm of Cochran & Ellison, also of Oklahoma, and later the firm of Patterson, Eagle, Greenough & Day of New York, were retained for further assistance. Hummer & Foster also employed the services of McCrory & Monk. (R. 236.)

Prior to the engagement of any of these counsel, the firm of Cochran & Ellison had been employed by a contract dated June 19, 1923, and executed by a number of alleged kindred and heirs apparent of Barnett, to represent them in all matters respecting their interests and rights, both present and future,

in and to the estate of Jackson Barnett, and in all suits and proceedings then pending, or thereafter instituted, by the guardian of Jackson Barnett, or by any other person for him, with a view of protecting and preserving his estate. By the terms of that agreement C. B. McCrory was also retained, and the attorneys named were to receive a reasonable fee to be not less than thirty per cent, nor more than fifty per cent of the value of the property, or of such sum or sums as might be preserved to said alleged kindred, through their services. (R. 314.)

The District Court allowed $7,500 to Elmer S. Bailey, the *prochein ami,* and to his counsel twenty-five per cent of the property involved in the suit, plus $10,000, together with the sum of $4,282.93 expense money (R. 331, 336), aggregating in all approximately $184,000. The Circuit Court of Appeals reduced the allowance for attorneys' fees to $100,000, but affirmed the decision of the District Court in all other respects. (R. 372.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that the approval of the Secretary of the Interior of what the District Court held to be a void gift of bonds made by Jackson Barnett, released the restrictions on the property.

(2) In refusing to hold that the United States of America, intervener, through its Secretary of the Interior, is entitled to the return and to the custody of the property of Jackson Barnett, undimin-

ished by the payment of any allowance by way of counsel fees, allowances to next friend, or expenses.

(3) In affirming the decree of the District Court directing the payment to Elmer S. Bailey out of the restricted property in question of $7,500 as compensation for his services, and in affirming that decree to the extent of directing the payment of $100,000 out of those restricted funds to counsel employed by Bailey for their services.

(4) The Government contends that the allowances were excessive in amount and beyond fair and reasonable compensation for the services rendered.

REASONS FOR GRANTING THE WRIT

In this case a question of Federal law of importance has been decided, which has not been, but which should be, settled by this Court. A public interest is involved, because a trust fund is at stake, which the United States is administering for the benefit of an Indian ward. The question of the allowance, by order of the court, of counsel fees and expenses incurred by persons acting as next friends and instituting suits on behalf of incompetent Indians, out of their trust funds, without the consent or approval of the Secretary of the Interior either as to the propriety of payment or its amount, is of great importance in the administration of Indian trust funds by the United States.

Wherefore, it is respectfully requested that this petition for a writ of certiorari to review the judg-

ment of the Circuit Court of Appeals for the Second Circuit directing the payment of the allowances in question out of restricted funds be granted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

DECEMBER, 1929.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 331) is unreported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 372) is reported in 34 F. (2d) 916.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1929. (R. 377.) A petition for rehearing was duly filed in the Circuit Court of Appeals by certain of the respondents here (R. 378), and overruled by that court on September 18, 1929. The court's order was not filed, however, until September 19, 1929. (R. 384.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the facts and of the questions involved and of the assigned errors will be found in the petition.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of May 27, 1908, c. 199, 35 Stat. 312, are as follows:

> SEC. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. * * * and all allotted lands of enrolled full bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; * * *.

The pertinent Rules and Regulations promulgated by the Secretary of the Interior, particularly Regulation No. 24, for the regulation of the disbursement of funds belonging to restricted Indians of the Five Civilized Tribes, provided in effect that no royalties derived from restricted allotted property should be paid to the lessor or his representatives, and that in cases of leases of incompetents the payments should be made to the Superintendent of the Five Civilized Tribes, to be held by him to the credit of the guardian of the incompetent, and paid out by him to the guardian upon his voucher approved by the proper County Court. The above-numbered Regulation provides further that the Superintendent is (R. 148)—

> authorized in his discretion, where considered for the best interests of any adult * * * incompetent lessor * * * for whose account royalties * * * accruing under any lease have been paid to said Superintendent, to withhold the disbursement of such royalties * * * wholly or in part from any such adult, or guardian * * * of any such incompetent * * * until such time or times as the payment thereof is considered best for the benefit of said lessor * * *.

This Regulation was amended on October 7, 1922, as follows (R. 153):

> in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent * * * shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.

ARGUMENT

I

The outstanding question presented by the petitioner is the power and authority of the court below to administer and disburse funds from the property in question. The bonds involved, and the income therefrom, are impressed with the same

trust as the allotted lands of the Indian ward of the Government from which the bonds were derived. It is well settled that the trust imposed upon the United States in the administration of restricted Indian lands extends to the proceeds derived therefrom, and that where the alienation of such lands is restricted, moneys derived therefrom are likewise restricted. These bonds were derived from royalties from oil and gas produced under a lease of Jackson Barnett's allotment approved by the Secretary of the Interior. In the case of *United States* v. *Brown*, 8 F. (2d) 564, 567, the Court, referring to the Act of May 27, 1908, *supra*, said:

> The act does in terms, however, authorize the making of these leases subject to the approval of the Secretary of Interior. It must be conceded that the royalties accruing therefrom are lodged with the officers of that department impressed with the same trust as are the lands themselves. *United States* v. *Gray*, 201 F. 291, 119 C. C. A. 529; *United States* v. *Hinkle* (C. C. A.) 261 F. 518; *United States* v. *Moore* (C. C. A.) 284 F. 86.

See also *Parker* v. *Richard*, 250 U. S. 235.

II

The restrictions imposed by Congress against alienation are not personal to the allottee. They inhere in the status of the lands. They run with the land. *Egan* v. *McDonald*, 246 U. S. 227; *Levindale Ledd Co.* v. *Coleman*, 241 U. S. 432; *Bowling* v. *United States*, 233 U. S. 528. They prohibit both

voluntary and involuntary alienation. Such lands are not subject to judicial sale on execution. No part of them can be sold under a judicial decree of partition. *United States* v. *Bellm*, 182 Fed. 161. They are tax exempt. *United States* v. *Brown, supra; United States* v. *Thurston County*, 143 Fed. 287. They are inalienable not only in the hands of the allottee but in the hands of the heir as well. *Parker* v. *Richard, supra; United States* v. *Aaron*, 183 Fed. 347; *Goodrum* v. *Buffalo*, 162 Fed. 817. See also *Heckman* v. *United States*, 224 U. S. 413, 446–447.

III

The District Court in its opinion in *Barnett* v. *Equitable Trust Co.*, 21 F. (2d) 325, declared the gift to be null and void. That court said (p. 332):

> From all the evidence in the case, I am strongly of the opinion that the gifts which purport to have been made by Barnett can not be regarded as his acts and deeds, and must be held to be void and of no effect.

Without the approval of the Secretary of the Interior, Barnett's action, even had he been competent, would have been a nullity. If Barnett's act was void, there was nothing for the approval of the Secretary to act upon, and the alleged transfer was equally a nullity. *Jennings* v. *Wood*, 192 Fed. 507.

Because of the restricted character of the particular property in question held by the Secretary of the Interior, although wrongfully out of his immediate possession, the court could not disburse it, or

order disbursement therefrom. That, we submit, is solely within the power of the Secretary of the Interior, since the administration of the trust was reposed in him by law. His attempted action in partially releasing restrictions from the property having been a nullity, disbursement of the same thereafter could be lawfully made only with his approval. The courts can not assume and perform this official duty for him. *First Moon* v. *White Tail*, 270 U. S. 243; *Work* v. *Rives*, 267 U. S. 175; *Lane* v. *Mickadiet*, 241 U. S. 201; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578.

On the determination of the status of the property the United States was entitled to its return to the Secretary of the Interior, undiminished. The right of the United States to have it so returned to him was not affected by the fact that he was imposed upon as to the facts or had misinterpreted his authority and allowed the property to pass out of his immediate possession. His duty as to this property, under the law, remained unchanged and entirely unaffected by his prior invalid acts. His attempted removal of the restrictions being nugatory did not convert the property involved into "free funds," as stated by the court below.

The decree of the District Court became final November 21, 1927, and the appeal therefrom, having been dismissed on jurisdictional grounds, that decree became the sole determination of the original case on the merits, and must stand as the law of the

case. That decree established the status of the property involved, as restricted Indian funds. (R. 173, 193.) The Circuit Court of Appeals, we submit, had no power, in this present proceeding, to construe the funds here involved to be "unrestricted and free funds."

The duty devolves upon the United States to protect the Indian, and discharge the trust assumed by it. To permit this trust property to be charged with counsel fees and expenses of voluntary next friends in its recovery, after it had been unlawfully obtained from the officer of the Government charged with its care, would appear to be a violation of the trust by the United States. The United States must, we submit, assume the whole burden of recovering the property, and executing the trust which it has assumed. Its intervention in the suit was for that purpose, and by its intervention it performed that duty.

IV

The interests of the United States in this case, and of the next friend, Elmer S. Bailey, and his attorneys, were in material aspects adverse from the beginning. They were suing upon the theory that the action of the Secretary of the Interior released the funds from his supervision and control and sought to recover the property for Bailey, then acting as guardian under an invalid appointment of the County Court in Oklahoma. (R. 25.) Not until after the suit was tried in the District Court was

Bailey's appointment as guardian vacated by the Supreme Court of Oklahoma. *Appeal of Barnett*, 122 Okla., 160. But that did not alter the matter, for had the action of the Secretary of the Interior attempting to release the restrictions been valid, upon the decree of the court annulling the gifts made by Barnett, he would have been entitled to the property free from any control by the Secretary. From the beginning, the United States sought to regain the funds, and restore them to the Secretary of the Interior. (R. 102.) The attorneys employed by the next friend had a double interest in the suit. McCrory & Monk and Cochran & Ellison had contracts with the alleged kindred and "heirs apparent" of Jackson Barnett to assist in any pending litigation looking to the protection and conservation of Barnett's property. (Exhibit 82, R. 314-317.) In a single respect were the United States and the plaintiff at one—to have the deed of gift set aside. The efforts of the next friend and his attorneys to recover the property for Barnett, free from restrictions, or for his guardian, failed. They acquiesced in the decree setting aside the gift and restoring the funds to the Secretary, although that result was not what they had prayed for.

We submit that the facts appearing in the record with respect to the nature of the litigation and of the respondents' services show that the allowances were at least excessive in amount. In view of the character of the fund here involved and of the trust relation of the United States to the Indian

beneficiary thereof, it is submitted that the question whether charges which would deplete it are excessive has an importance which the ordinary question of the amount of attorneys' fees does not present, and that it may properly be taken into consideration in connection with the principal question of which review is sought.

CONCLUSION

It is submitted that the decision below was wrong and should be reviewed by this Court upon a writ of certiorari.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.

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Attorney.

DECEMBER, 1929.

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